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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 United States of America,) No. CV 09-694-PHX-SMM (MHB)

10 Plaintiff,) No. CR 05-1085-PHX-SMM

11 v.) **ORDER**

12 Julian Johnny Harvill,)

13 Defendant/Movant.)

14 _____)

15 Movant Julian Johnny Harvill, who is confined in the Maricopa County Fourth
16 Avenue Jail, has filed a *pro se* “Motion Under 28 USC § 2255 To Vacate, Set Aside, Or
17 Correct Sentence By A Person In Federal Custody.” The Court will summarily dismiss the
18 Motion without prejudice.19 **I. Procedural History**20 On April 3, 2009, Movant filed the instant § 2255 Motion. Under “Case No.” on the
21 front page of the Motion, Movant had typed in the case number of “CR-05-01085-001-PHX.”
22 Consequently, the Clerk of Court opened a civil case, CV 09-694-PHX-SMM (MHB), filed
23 the Motion in the civil case (Doc. #1 in CV 09-694-PHX-SMM (MHB)), and also filed the
24 Motion in the criminal case (Doc. #60 in CR 05-1085-PHX-SMM).25 In CR 05-1085-PHX-SMM, Movant pled guilty pursuant to a plea agreement to Felon
26 in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). On July 9,
27 2007, the Court sentenced Movant to a 30-month term of imprisonment, followed by three
28 years on supervised release.

1 However, in his Motion, Movant indicates with regard to the judgment of conviction
2 under attack that he pled guilty to “Conspiracy to Possess With Intent to Distribute 100
3 Kilograms of More of Marijuana,” in violation of 21 U.S.C. §§ 846 and
4 841(a)(1)(b)(1)(B)(vii), and that he was sentenced to an 84-month term of imprisonment. It
5 is evident to the Court that Movant is referring to his conviction and sentence in another
6 criminal case in this Court, CR 05-264-PHX-SMM.

7 Moreover, in his Memorandum of Points and Authorities included with the Motion,
8 Movant states “[t]hat on or about July 9, 2007, Defendant was sentenced in the United States
9 District Court for the District of Arizona (Phoenix Docket), Case Number CR-05-01085-001-
10 PHX, to a term of thirty-(30) months imprisonment for Felon in Possession of a Firearm, a
11 violation of Title 18 U.S.C. §§ 922(g)(1) and 924(a)(2). [This conviction and sentence is not
12 being challenged in the within § 2255 Motion.]”

13 Accordingly, it appears that Movant is seeking to challenge his sentence in CR 05-
14 264-PHX-SMM, rather than his conviction and sentence in CR 05-1085-PHX-SMM.

15 **II. Dismissal of § 2255 Motion Without Prejudice**

16 Because Movant is not challenging his conviction and sentence in CR 05-1085-PHX-
17 SMM, the Court will summarily deny the instant § 2255 Motion without prejudice to Movant
18 filing a new § 2255 motion attacking his conviction or sentence in CR 05-264-PHX-SMM.

19 Any new § 2255 motion must be filed on a court-approved form, must include the
20 correct criminal case number, and **must not** include a civil case number. Upon the filing of
21 the new § 2255 motion, the Clerk of Court will open a new civil case, with a new civil case
22 number. As a courtesy, the Clerk of Court will be directed to mail Movant a court-approved
23 form for filing a § 2255 motion.

24 **IT IS ORDERED:**

25 (1) That the “Motion Under 28 USC § 2255 To Vacate, Set Aside, Or Correct
26 Sentence By A Person In Federal Custody” (Doc. #60 in CR 05-1085-PHX-SMM) is **denied**
27 **without prejudice** and that the civil action opened in connection with this Motion (CV 09-
28

1 694-PHX-SMM (MHB)) is **dismissed without prejudice**. The Clerk of Court **must enter**
2 **judgment** accordingly.

3 (2) The Clerk of Court **must mail** Movant a court-approved form for filing a
4 Motion to Vacate, Set Aside or Correct Sentence By a Person in Federal Custody (28 U.S.C.
5 § 2255).

6 DATED this 20th day of May, 2009.

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9 Stephen M. McNamee
10 United States District Judge
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**Instructions for Filing a Motion to Vacate, Set Aside, or Correct a Sentence
by a Person in Federal Custody (Motion Under 28 U.S.C. § 2255)
in the United States District Court for the District of Arizona**

1. **Who May Use This Form.** To use this form, you must be a person who is serving a sentence under a judgment against you in a federal court. You also may use this form to challenge a federal judgment that imposed a sentence to be served in the future. You are asking for relief from the conviction or the sentence. This form is your motion for relief. In this motion, you may challenge only one judgment. If you want to challenge more than one judgment, you must file a separate motion for each judgment. **This form should not be used in death penalty cases.** If you were sentenced to death, you are entitled to the assistance of counsel and you should request the appointment of counsel.
2. **The Form. Local Rule of Civil Procedure (LRCiv) 3.5(a) requires that motions to vacate must be filed on the court-approved form.** The form must be typed or neatly handwritten. All questions must be answered clearly and concisely in the appropriate space on the form. If needed, you may attach additional pages. The form, however, must be completely filled in to the extent applicable. You do not need to cite law. If you want to file a brief or arguments, you must attach a separate memorandum.
3. **Your Signature.** You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. **No Filing Fee.** No fee is required with this motion.
5. **Original and Judge's Copy.** You must send an **original and one copy** of your motion and of any other document submitted to the Court. You must send one additional copy to the Court if you wish to have a file-stamped copy of the document returned to you. All copies must be identical to the original. Copies may be legibly handwritten.
6. **Where to File.** You must file the form in the United States District Court that entered the judgment that you are challenging. When you have completed the form, mail the **original and one copy** to the Clerk of the United States District Court at the division where you were sentenced:

Phoenix & Prescott Divisions:
U.S. District Court Clerk
U.S. Courthouse, Suite 130
401 West Washington Street, SPC 10
Phoenix, Arizona 85003-2119

OR

Tucson Division:
U.S. District Court Clerk
U.S. Courthouse, Suite 1500
405 West Congress Street
Tucson, Arizona 85701-5010

7. **Change of Address.** You must immediately notify the Court and respondents in writing of any change in your mailing address. **Failure to notify the Court of any change in your mailing address may result in the dismissal of your case.**

8. Certificate of Service. You must provide the respondent with a copy of any document you submit to the Court (except the initial motion to vacate). Each original document (except the initial motion to vacate) must include a certificate of service on the last page of the document stating the date a copy of the document was mailed to the respondent and the address to which it was mailed. Fed. R. Civ. P. 5(a), (d). Any document received by the Court that does not include a certificate of service may be stricken. A certificate of service should be in the following form:

I hereby certify that a copy of the foregoing document was mailed
this _____ (month, day, year) to:

Name: _____

Address: _____

Attorney for Respondent

(Signature)

9. Amended Motion to Vacate. If you need to change any of the information in the initial motion to vacate, you must file an amended motion. The amended motion must be written on the court-approved motion to vacate form. You may file one amended motion without leave (permission) of Court before the respondent has answered your original motion to vacate. See Fed. R. Civ. P. 15(a). After the respondent has filed an answer, you must file a motion for leave to amend and lodge (submit) a proposed amended motion to vacate. LRCiv 15.1. An amended motion may not incorporate by reference any part of your prior motion. LRCiv 15.1(a)(2). Any grounds not included in the amended motion to vacate are considered dismissed.

10. Letters and Motions. It is generally inappropriate to write a letter to any judge or the staff of any judge. The only appropriate way to communicate with the Court is by filing a written pleading or motion.

11. Grounds for Relief. You must raise all grounds for relief that relate to this conviction or sentence. Any grounds not raised in this motion will likely be barred from being raised at a later date.

FINAL NOTE

You should follow these instructions carefully. Failure to do so may result in your motion being stricken or dismissed by the Court. All questions must be answered concisely in the proper space on the form. If you need more space, you may attach additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the motion is being continued and number all pages.

Name and Prisoner/Booking Number

Place of Confinement

Mailing Address

City, State, Zip Code

(Failure to notify the Court of your change of address may result in dismissal of this action.)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,

) **No. CR** _____

(Enter your criminal case number)

Plaintiff,

)

vs.

) **No. CV** _____

(To be supplied by the Clerk)

(Full name of Movant. Include the name under
which you were convicted.)

) **MOTION UNDER 28 U.S.C. § 2255
TO VACATE, SET ASIDE OR
CORRECT SENTENCE BY A
PERSON IN FEDERAL CUSTODY**

Defendant/Movant.

)

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____

(b) Criminal docket or case number: _____

2. Date of judgment of conviction: _____

3. In this case, were you convicted on more than one count or crime? Yes No

4. Identify all counts and crimes for which you were convicted and sentenced in this case: _____

5. Length of sentence for each count or crime for which you were convicted in this case: _____

6. (a) What was your plea?
Not guilty
Guilty
Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or charge, and a not guilty plea to another count or charge, give details: _____

(c) If you went to trial, what kind of trial did you have? (Check one) Jury Judge only

7. Did you appeal from the judgment of conviction? Yes No

If yes, answer the following:

(a) Date you filed: _____

(b) Docket or case number: _____

(c) Result: _____

(d) Date of result: _____

(e) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

8. Did you file a petition for certiorari in the United States Supreme Court? Yes No

If yes, answer the following:

(a) Date you filed: _____

(b) Docket or case number: _____

(c) Result: _____

(d) Date of result: _____

(e) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

9. Other than the direct appeals listed above, have you filed any other petitions, applications or motions concerning this judgment of conviction in any court? Yes No

If yes, answer the following:

(a) First petition, application or motion.

(1) Date you filed: _____

(2) Name of court: _____

(3) Nature of the proceeding: _____

(4) Docket or case number: _____

(5) Result: _____

(6) Date of result: _____

(7) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

(b) Second petition, application or motion.

(1) Date you filed: _____

(2) Name of court: _____

(3) Nature of the proceeding: _____

(4) Docket or case number: _____

(5) Result: _____

(6) Date of result: _____

(7) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

(c) Did you appeal the action taken on your petition, application or motion?

(1) First petition: Yes No

(2) Second petition: Yes No

(d) If you did not appeal from the action your petition, application or motion, explain why you did not:

12. For this motion, beginning on the next page, **state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States.** Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: If you fail to set forth all the grounds in this motion, you may be barred from presenting additional grounds at a later date.

GROUND ONE: _____

(a) Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Did you present the issue raised in Ground One to the court of appeals? Yes No

Yes No

(c) If you did not raise this issue in a direct appeal, explain why: _____

GROUND TWO: _____

(a) Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Did you present the issue raised in Ground Two to the court of appeals? Yes No

Yes No

(c) If you did not raise this issue in a direct appeal, explain why: _____

GROUND THREE: _____

(a) Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Did you present the issue raised in Ground Three to the court of appeals? Yes No

Yes No

(c) If you did not raise this issue in a direct appeal, explain why: _____

GROUND FOUR: _____

(a) Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Did you present the issue raised in Ground Four to the court of appeals? Yes No

Yes No

(c) If you did not raise this issue in a direct appeal, explain why: _____

Please answer these additional questions about this motion:

13. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes No

If yes, give the date of filing, the name and location of the court, the docket or case number, the type of proceeding, and the issues raised: _____

14. Do you have any future sentence to serve after you complete the sentence imposed by the judgment you are challenging? Yes No

If yes, answer the following:

(a) Name and location of the court that imposed the sentence to be served in the future: _____

(b) Date the sentence was imposed: _____

(c) Length of the sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition or application that challenges the judgment or sentence to be served in the future? Yes No

15. TIMELINESS OF MOTION: If your judgment of conviction challenged in this motion became final more than one year ago, you must explain why the one-year statute of limitations in 28 U.S.C. § 2255 does not bar your motion.* _____

*Section 2255 provides in part that:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction becomes final;

- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

16. Movant asks that the Court grant the following relief: _____

or any other relief to which Movant may be entitled. (Money damages are not available in § 2255 cases.)

I declare under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____ (month, day, year).

Signature of Movant

Signature of attorney, if any

Date